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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

M.M., Petitioner, v. THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent; CONTRA COSTA COUNTY CHILDREN AND FAMILY SERVICES BUREAU et al., Real Parties in Interest.	A160676 (Contra Costa County Super. Ct. No. J18-00432)

M.M. (Father), the father of now two-year-old A.M., seeks review by extraordinary writ of the juvenile court's dispositional order reducing the frequency of his visits with A.M. and requests a stay of the pending hearing under Welfare and Institutions Code section 366.26.[1] Finding no error, we deny the petition.

[1] Undesignated statutory references are to the Welfare and Institutions Code.

I. BACKGROUND

A. *The Petition, Detention, and Jurisdiction*

The Contra Costa County Children and Family Services Bureau (Bureau) filed a dependency petition on behalf of A.M. on April 11, 2018, as well as a detention and jurisdiction report on April 12, 2018. The petition and report stated that, at the time of A.M.'s birth in April 2018, she and her mother, J.W. (Mother), tested positive for methadone, which Mother was not prescribed, and benzodiazepines and oxycodone, which she was prescribed. Mother had been taking these medications throughout her pregnancy with A.M. As a result, A.M. experienced significant withdrawal symptoms for several days, making it difficult for her to eat and sleep and requiring her to be prescribed morphine to limit the withdrawal symptoms.

The petition alleged that A.M. came within section 300, subdivision (b)(1) (failure to protect), and that A.M. was at a substantial risk of harm if she remained in Mother's care due to her substance abuse (count b-1). The petition did not contain allegations concerning Father.

The detention and jurisdiction report noted that Father visited Mother and A.M. at the hospital and signed a declaration of paternity form. According to Mother, Father was " 'in and out' of her life and 'comes around when he wants.' "

At the April 12, 2018 detention hearing, the court ordered A.M. detained and permitted both parents to visit A.M. under supervision, once per week for Father. Father's status was raised to that of presumed father.

On June 14, 2018, the parties submitted a proposed mediation agreement to amend the petition, adding count b-2 to allege that A.M. is at a substantial risk of harm if placed in Mother's care due to her substance abuse, as evidenced by A.M. testing positive for methadone and other

prescription medications at her birth and experiencing significant withdrawal symptoms over several days.

At the jurisdiction hearing held that same day, the court dismissed count b-1 of the initial petition and sustained count b-2 of the amended petition allegations pursuant to the mediation agreement and declared A.M. a dependent. Father was granted supervised visits once per week. The court also ordered both parents to submit to drug testing, which Father refused.

B. *Disposition on the Initial Petition*

Prior to the disposition hearing, the Bureau reported Father failed to attend meetings scheduled for him to discuss referrals for services. Father "expressed frustration at [the Bureau] and the Court system for 'throwing [him] under the bus.' " Father also failed to report his drug test results at any of the scheduled reporting times. He also refused to submit to court-ordered drug testing on two other occasions. Concerning visitation, the Bureau left Father a voicemail message informing him that a supervised visit would occur on June 21, 2018. The Bureau did not hear back from Father.

Accordingly, the Bureau reported that Father "has taken no steps to demonstrate his willingness to cooperate with the Bureau in order for [it] to assess the safety and appropriateness of his home for placement." The Bureau expressed concern about Father's hostility towards the court and refusal to submit to drug testing, thereby preventing any recommendation to place A.M. with Father.

The Bureau prepared a case plan for both parents. Father's case plan required him to receive general counseling and mental health services, parenting education, substance abuse treatment, and drug testing.

The disposition hearing took place on June 27, 2018. The court found by clear and convincing evidence there was a substantial danger to A.M. if she were returned to Mother's custody and that placing A.M. with Father

would be detrimental to A.M. The court approved the Bureau's placement of A.M. with her maternal grandparents. The court ordered the parties to comply with their case plans. It also permitted the continuation of Father's supervised visits once per week.

C. *The Review Hearings*

Prior to the six-month review hearing, the Bureau reported Father attended five of the 17 scheduled supervised visits with A.M. During completed visits, Father was attentive to A.M. Father held, kissed, and talked to her. A.M. appeared bonded to both of her parents, as evidenced by her watching, smiling, playing, kissing, and reaching for them. The Bureau recommended that Father continue supervised visits four times per month.

The Bureau also reported Father did not participate in case plan services. Father maintained "he could not understand why he was required to participate in services given that he did not live with [Mother] and was not aware of her substance use." According to Father, participating in services would amount to his admission of "guilt for something he had nothing to do with or was even aware of."

The court held the six-month review hearing on December 13, 2018. It ordered that A.M. be returned to Mother's custody. Father was allowed supervised visits once per week and was ordered to confirm his attendance in advance and arrive at the visitation location one hour early or risk cancelling the visit.

The Bureau prepared a report prior to the 12-month review hearing. Father continued to refuse services and missed his supervised visits. Father stated he was not visiting A.M. "because he was informed that he had to be engaged in services in order to have visits." Father reiterated to the Bureau that he was unavailable for visits and he was interested in having custody of A.M. regardless of his participation in services. The Bureau recommended

reducing Father's supervised visitation from once per week to once per month.

The court held the 12-month review hearing on June 20, 2019. It ordered that A.M. remain in Mother's custody and that Father may not live in the same household as A.M. The court reduced Father's supervised visits from once per week to once per month.

Prior to an interim review hearing concerning Mother's progress with her case plan, the Bureau filed a memorandum noting Father inquired about visitation and placement of A.M. in his care but had not visited A.M. during the reporting period. At the interim review hearing, the court denied Mother's request to dismiss the case.

D. *Domestic Violence Incidents and the First Amended Supplemental Petition*

On November 14, 2019, Mother filed a request for a restraining order against Father. Mother alleged that on November 5, 2019, Father entered her apartment without notice and verbally and physically attacked her. Father allegedly broke into the apartment the next day when Mother and A.M. were not home. Then, on November 10, 2019, Father went to the apartment uninvited, forced himself inside, and verbally and physically attacked Mother. A.M. was sleeping in the apartment at the time but had no contact with Father. An emergency protective order was issued on November 10, 2019, and a temporary restraining order was issued on November 14, 2019.

On January 14, 2020, the Bureau filed the first amended supplemental petition for a more restrictive placement of A.M. pursuant to section 387. It alleged that both Mother and Father each placed A.M. at substantial risk of physical and emotional harm by exposing her to ongoing domestic violence.

Thereafter, the Bureau informed the court that despite being served with the temporary restraining order, Father showed up at Mother's apartment. Also, according to police reports concerning the domestic violence incidents, Father had been staying at Mother's apartment.

In a later status review report, the Bureau noted it received a suspected child abuse report alleging general neglect of A.M. by her parents, and emotional abuse by Father, stemming from the domestic violence incidents. The general neglect allegation was substantiated, while the emotional abuse allegation was found inconclusive. In light of the recent domestic violence incidents and Mother's allowing Father access to her home despite the court's order prohibiting it, the Bureau determined A.M.'s safety was at risk.

During the reporting period, Father continued to refuse to participate in services and did not attend supervised visits. The Bureau recommended the court order prohibiting Father from living in the same household as A.M. and continuing his supervised visits once per month.

At a hearing on January 23, 2020, the court issued a five-year restraining order against Father. The court allowed Father supervised visits with A.M. once per week.

The court scheduled a hearing concerning the emergency placement of A.M. with her maternal grandparents on February 20, 2020. Prior to the hearing, the Bureau reported that Father had visited A.M. and that their interactions were appropriate. Father provided certificates for completing parenting education classes. He also had been attending a drug treatment program. Father, however, either tested positive for amphetamine and methamphetamine or failed to appear for drug testing between January 2 and February 10, 2020.

On February 14, 2020, the maternal grandparents requested to be declared de facto parents. At the February 20, 2020 hearing, the court approved an emergency placement of A.M. with her maternal grandparents.

The Bureau informed the court that on May 1, 2020, police responded to another domestic violence incident between Father and Mother. Police arrested and detained Father for inflicting corporal injury on Mother (Pen. Code, § 273.5), violating the restraining order against him (*id.*, § 166, subd. (a)(4)), and assault with a deadly weapon (*id.*, § 245, subd. (a)(4)). Father was scheduled to be released on June 11, 2020.

Additionally, the Bureau reported that Father tested negative for drugs once in March 2020 but tested positive or otherwise did not call in at the scheduled reporting times. The Bureau also reported that Father visited A.M. either in person or virtually due to the then-shelter-in-place order. Father's interactions with A.M. were positive. He played with her, gave her hugs and kisses, and spoke to her in gentle tones. A.M. appeared happy to see Father.

On June 25, 2020, Mother and Father each filed a waiver of various trial and appellate rights and submitted on the allegations of the first amended supplemental petition, with minor amendments. Counts S-1 and S-2 were renamed counts S-3 and S-4, respectively. The allegations were also amended to add to both counts that on December 31, 2019 and May 1, 2020, Father perpetrated *severe* physical and verbal domestic violence on Mother.

The court held a hearing on June 25, 2020, and declared A.M.'s maternal grandparents to be her de facto parents. The court sustained counts S-3 and S-4 of the first amended supplemental petition and dismissed counts S-1 and S-2. It also ordered that visitation shall be scheduled such

that Mother and Father would have no opportunity to engage with each other in any way.

E. ***Disposition on the First Amended Supplemental Petition***

Prior to the disposition hearing on the section 387 petition, the Bureau reported that Father had missed six of the thirteen scheduled visits, with two of the missed visits occurring while he was in jail from May 1 to June 11, 2020. Father had "repeatedly said he has no reason to visit the child . . . supervised at [Child and Family Services] offices when he can see her whenever he wants through the mother." However, when Father did visit A.M, their interactions were positive and A.M. appeared happy to see him. Father also had been participating in substance abuse treatment programs and parenting education classes. However, he had only tested negative for drugs once, and either tested positive or did not show up for testing on all other occasions.

The Bureau recommended the court find that returning A.M. to Mother's custody would pose a substantial danger to A.M; find that Father is a non-custodial parent who has not requested custody of A.M.; terminate reunification services to Mother and Father for failing to keep A.M. safe, despite receiving approximately 18 months of service; reduce Mother's supervised visits from four times per month to twice per month; reduce Father's supervised visits from four times per month to once per month; and set a selection and implementation hearing pursuant to section 366.26.

The court virtually conducted the disposition hearing on July 30, 2020. Father's attorney objected to the Bureau's recommendations to deny Father reunification services and to set a section 366.26 hearing and requested Father be permitted to visit A.M. with the same frequency as Mother. In response, the Bureau's attorney stated Father had "missed approximately half of his visits since April." A.M.'s attorney explained that Father's excuse

for not visiting A.M. "was that he can see her any time when she was with her mother." The court acknowledged that Father's time in jail in May to June 2020 accounted for some of the missed visits, but not the others.

The court found by clear and convincing evidence that there is a substantial danger to A.M. if she were returned home. The court terminated reunification services to both parents and set a section 366.26 hearing for November 19, 2020. Mother was granted supervised visits twice per month; Father was granted supervised visits once per month.

II. DISCUSSION

Father's sole contention in his petition is that the juvenile court erred in reducing the frequency of his visits with A.M. from once per week to once per month. We disagree.

"Courts have long held that in matters concerning . . . visitation trial courts are vested with broad discretion. On appeal the exercise of that discretion will not be reversed unless the record clearly shows it was abused." (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953.) " ' "[T]he trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination." ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*Id.* at pp. 318–319; see *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

Section 366.21, subdivision (h) provides that when a court sets a hearing under section 366.26, "it shall also order the termination of reunification services to the parent" and "shall continue to permit the parent . . . to visit the child pending the hearing unless it finds that visitation would

be detrimental to the child." Here, at the July 30, 2020 disposition hearing, the juvenile court set a section 366.26 hearing and permitted Father to continue his supervised visits with A.M. once per month, a reduction from once per week.

In our view, the juvenile court properly evaluated the evidence and reasonably decided to reduce Father's visitation. The record establishes that Father's visitation with A.M. was inconsistent. Father does not dispute he missed six of the thirteen scheduled visits in the four months leading up to the disposition hearing. He missed visits because he had failed to confirm his attendance in advance, was in jail for committing domestic violence against Mother, or simply failed to appear. Father also arrived late to two of the visits. We think that Father's failure to take advantage of the opportunity to visit A.M. was a reasonable justification for the court to reduce the frequency of his visits.

The record also shows that Father often expressed he was unwilling to attend supervised visits. For example, Father repeatedly told the Bureau "he has no reason to visit the child . . . supervised at [the Bureau's] offices when he can see her whenever he wants through . . . [M]other." Given these circumstances, the Bureau and juvenile court could reasonably conclude that Father's behavior pattern in failing to visit with his child was not likely to change. We therefore find the court acted within its discretion in reducing Father's visitation.

Father's arguments to the contrary are unpersuasive. Father first argues that, because his visits with A.M. were positive and he recently had demonstrated progress with his case plan, visitation should not have been reduced. These arguments, however, ignore the reason the court reduced visitation: Father's noncompliance with the visitation schedule. It is clear

that Father and A.M. were bonding and shared positive interactions and Father had begun to avail himself of services. But it is equally clear that Father was unable and unwilling to make scheduled visits a priority.

Father next cites to *In re Jennifer G.* (1990) 221 Cal.App.3d 752; *In re Brittany S.* (1993) 17 Cal.App.4th 1399; and *In re David D.* (1994) 28 Cal.App.4th 941 to challenge the juvenile court's visitation order. However, as explained below, Father misplaces reliance on these cases. Much of Father's argument is relevant only where a court chooses to terminate visitation altogether. Here, that is not so. Father was permitted to continue visiting A.M., but on a reduced basis.

Relying on *In re Jennifer G., supra*, 221 Cal.App.3d 752, Father argues that before the juvenile court reduced his visitation, it had to find his visits with A.M. were detrimental. But *In re Jennifer G.* does not impose such a requirement. Nor does section 366.21, subdivision (h), the statute at issue here. As indicated above, the statute provides that the court shall permit visitation when it sets a section 366.26 hearing "unless it finds that visitation would be detrimental to the child." (§ 366.21, subd. (h).) Under the statute's plain terms, there is no legal requirement for the court to find visits are detrimental where, as here, the court permits visitation, much less where it defines the terms and conditions of visitation.

Likewise unpersuasive is Father's reliance on *In re Brittany S.*, *supra*, 17 Cal.App.4th 1399. There, an incarcerated mother was denied visitation with her child during most of the reunification period leading up to the 12-month review hearing. (*Id.* at p. 1407.) The appellate court determined the social services agency failed to offer her reasonable reunification services. (*Ibid.*) The mother's service plan limited contact to telephone calls and letters, even if she was incarcerated at a facility less than 40 miles from

where her child lived. (*Id.* at pp. 1403, 1407.) The court concluded that, "[b]y not providing visitation, [the social services agency] virtually assured the erosion (and termination) of any meaningful relationship between [the mother] and [minor]." (*Id.* at p. 1407.) Finding that visitation could have made a difference in the case because the mother substantially complied with the service plan, the court expressed, "Unfortunately, this appears to be a case where an incarcerated parent was destined to lose her child no matter what she did. We cannot condone such a result." (*Ibid.*)

Here, unlike in *In re Brittany S.*, the juvenile court allowed Father to continue to visit A.M., including during the time he was in jail. Any barriers to ensuring a meaningful relationship between Father and A.M. had more to do with Father's own failure or refusal to visit A.M. throughout the proceedings than the fact he was in jail for about one month. For instance, during the reunification period, Father declined supervised visits if it required his participation in services, which he refused. Also, as discussed above, Father maintained it was unnecessary for him to attend supervised visits because he believed he could visit A.M. whenever he wished through Mother.

Father next cites to *In re David D.*, *supra*, 28 Cal.App.4th 941 and argues that it is a violation of due process "for the state to interfere with the [parent-child] relationship leading up to a 366.26. hearing." In *In re David D.*, the appellate court found it error to deny regular visitation between a mother and her children after terminating reunification services. (*Id.* at p. 943.) The mother had made significant progress and the social worker had recommended the minors be returned to the mother within six months. (*Id.* at p. 952.) The mother's depression, however, resulted in her attempted suicide. When she did not deliver her hospital records to the court,

the court suspended all visitation, despite "overwhelming evidence of the minors' bond with their mother." (*Id.* at pp. 952, 955.) Here, by contrast, Father was consistently provided with visitation. Further, unlike in *In re David D.*, the court's decision to reduce the frequency of Father's visits was not arbitrary, but reasonably based on his failure to consistently attend the visits available to him.

Lastly, Father relies on *In re Luke L.* (1996) 44 Cal.App.4th 670, in which the court stated that"[v]isitation may be seen as an element critical to promotion of the parents' interest in the care and management of their children, even if actual physical custody is not the outcome." (*Id.* at p. 679.) Other than quoting this one statement from *In re Luke L.*, Father makes no attempt to explain its application to the visitation order here. " 'The absence of a cogent legal argument . . . allows this court to treat the contention as waived.' " (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Thus, any suggestion by Father that the court failed to promote his "interest in the care and management of [A.M.]" has been waived. (*In re Luke L.*, at p. 679.)

In sum, therefore, we conclude that Father has not shown the juvenile court abused its discretion in reducing the frequency of his visits with A.M.

III. DISPOSITION

Father's petition is denied on the merits. (See § 366.26, subd. (l)(1)(C); Cal. Rules of Court, rule 8.452(h).) The request for a stay is denied. Our decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

STREETER, J.

WE CONCUR:

POLLAK, P. J.
TUCHER, J.